Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KENNETH G. BROCKMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Amendment to the United States Constitution and this Court's holdings in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) and *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), requires a district court to elicit a voluntary and intelligent waiver of the right to counsel from a defendant whose court-appointed counsel has been removed by the court and who is ordered to obtain counsel or proceed *pro se*.

2. Whether a *pro se* defendant, after court removal of appointed counsel, is required to again formally request court-appointed counsel after he submits to the court evidence that he is financially unable to obtain counsel.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals were as listed in the caption. The parties to the proceedings in the District Court included Petitioner's codefendant Carolyn Kruger.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eight Circuit entered in the above-titled proceeding on July 16, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is Reported as *United States v. Brockman*, 183 F.3d 891 (8th Cir. 1999), and is printed as Appendix, *infra*, 1-17.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered July 16, 1999. A timely Suggestion for Rehearing En Banc was denied on August 19, 1999.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

18 U.S.C. § 3006A

Relevant portion reprinted in Appendix, *infra*, 56-57.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

The Petitioner, Kenneth G. Brockman, was indicted with Carolyn Kruger by a federal grand jury on April 23, 1997. The indictment alleged that the Petitioner, Kruger and others conspired to commit and committed mail and wire fraud by soliciting money from lenders for various business projects, the majority of which the government alleged were never completed.

On May 13, 1997 the United States moved the court for a hearing to determine the Petitioner's eligibility for court-appointed counsel. Although Petitioner had already been appointed counsel by the court, the government alleged that Petitioner was not entitled to counsel under 18 U.S.C. § 3006A, the Criminal Justice Act. In a written order filed May 19, 1997, the federal magistrate judge granted the government's motion, ordered the Federal Public Defender to withdraw as counsel, and set forth that Petitioner was required to privately retain counsel or proceed *pro se*. (App. 18-22) Petitioner then appealed the magistrate's order to the district court which affirmed the

order of the magistrate. (App. 23-27) During the course of the pretrial proceedings, Petitioner submitted to the court documentation, which is reflected in the record below, showing his attempts to obtain counsel on a *pro bono* basis as he did not have funds to retain an attorney for a case of its complexity. (App. 28-38) Petitioner also moved the court to reconsider various rulings and submitted to the court a letter from the principal of 3KM Company who was funding Petitioner's work stating that it was the intent of the joint venture agreement he and Petitioner had entered that criminal defense fees would not be paid as part of the living expenses allowed under the agreement. (App. 53-54)

After proceeding to trial without counsel Petitioner was convicted, sentenced and subsequently appealed his conviction to the United States Court of Appeals for the Eighth Circuit. Petitioner claimed, among other errors, the district court failed to conduct the proper inquiry concerning Petitioner's understanding of the "pitfalls" of *pro se* representation. The panel of the Eighth Circuit concluded that the district court did not clearly err in determining that Petitioner was not entitled to appointed counsel and that Petitioner had failed to make a formal request for redetermination of his eligibility for court-appointed counsel. (App. 1-17)

Petitioner timely filed a Suggestion for Rehearing En Banc which was denied. (App. 55)

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE COURT BELOW IS IN CONFLICT WITH THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THIS COURT'S DECISIONS IN *JOHNSON V. ZERBST*, *FARETTA V. CALIFORNIA* AND THE APPLICATION OF THOSE DECISIONS IN THE FEDERAL CIRCUIT COURTS

The Sixth Amendment to the United States Constitution provides that all criminal defendants have the right to the assistance of counsel. While this Court has qualified the extent to which this right can and should be exercised, the case presented in this Petition exemplifies the precarious balance between the right to the assistance of counsel, the right to the assistance of counsel provided through public funds, and the extent to which defendants can be said to have waived that right in a voluntary and intelligent manner.

The opinion below is in conflict with this Court's decisions regarding the right to counsel under the Sixth Amendment. In *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) this Court stated:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court,

> and it would be fitting and appropriate for that determination to appear upon the record.

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), this Court addressed the balance to be struck between the Sixth Amendment's right to counsel provision and the right of a defendant in state court to self-representation where a defendant has made a specific request for self-representation. In *Faretta*, this Court required that any waiver of the right to counsel be made voluntarily and intelligently.

This Court has also held, "To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (plurality). Over sixty years ago this Court recognized that because the assistance of counsel is crucial to our adversarial system of justice, courts must "indulge every reasonable presumption against the waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). All of the federal circuit courts of appeal have also acknowledged this voluntary and intelligent waiver requirement when a defendant chooses to proceed *pro se*, though there exist differing indicia for this voluntary and intelligent waiver to be effectuated. *See e.g., United States v. Allen*, 789 F.2d 90 (1st Cir. 1986); *Torres v. United States*, 140 F.3d 392 (2d Cir.), *cert. denied*, 199 S.Ct. 595 (1998); *McMahon v. Fulcomer*, 821 F.2d 934 (3d Cir. 1987); *United States v. Singleton*, 107 F.3d 1091 (4th Cir.), *cert. denied*, 118 S.Ct. 84

(1997); *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998); *United States v. Silkwood*, 893 F.2d 245 (10th Cir. 1989).

Prior to indictment Petitioner applied for and was granted court-appointed counsel under the provisions of 18 U.S.C. § 3006A *et seq.*, also known as the Criminal Justice Act. Subsequent to indictment and an interview by United States Pretrial Services, the United States moved the district court to reconsider Petitioner's eligibility for court-appointed counsel. The federal magistrate issued a written order that the Petitioner was to proceed without counsel or obtain counsel with his own funds. (App. 18-22) This order was appealed to the district court and affirmed. (App. 23-27) At no time after the appointment of counsel did Petitioner make any request to proceed without the assistance of counsel. Further, neither the order removing court-appointed counsel nor the order affirming that ruling gave credence to the voluntary and intelligent waiver of counsel requirement, and neither order informed Petitioner of the pitfalls of self-representation. At no time after the order removing counsel and during the time the court was aware that Petitioner was proceeding *pro se* was there any colloquy regarding the pitfalls of self-representation or any record made as to a voluntary and intelligent waiver of the right to counsel. Even if Petitioner, for the sake of argument, had proceeded *pro se* voluntarily, which he did not, the court is still required to inquire into the voluntary and intelligent nature of the waiver under *Johnson v. Zerbst*, *Faretta v. California*, and all the federal circuit cases applying those opinions. Such an inquiry did not occur here.

The Eighth Circuit Court of Appeals affirmed the uncounseled conviction of the Petitioner in the instant

case. As justification, the panel stated that the district court was not clearly erroneous in its determination that Petitioner was financially able to obtain counsel. (App. 1-17) The result is a decision which allows the federal circuit courts to create an exception to the Sixth Amendment and this Court's holdings, whenever a district court determines that a defendant is not entitled to court-appointed counsel. The decision also results in less constitutional protection being afforded to a defendant whose court-appointed counsel is removed by the court than a defendant who voluntarily chooses to proceed *pro se*. Such a determination, one of constitutional magnitude, is virtually untouchable under the standard of review applied by the Eighth Circuit in the case at bar. By circumventing the Sixth Amendment and this Court's previous holdings, the opinion below creates a dangerous precedent which must be addressed and corrected.

II. THE DECISION OF THE COURT BELOW PLACES AN INTOLERABLE BURDEN ON *PRO SE* DEFENDANTS ENTITLED TO THE SIXTH AMENDMENT RIGHT TO COUNSEL

The panel of the Eighth Circuit Court of Appeals stated in its opinion that although Petitioner had submitted evidence to the court regarding his financial inability to obtain counsel, he failed to request reconsideration of the determination that Petitioner was not entitled to court-appointed counsel. (App. 1-17) The record below indicates that the district court was aware, prior to trial, that the Petitioner was not able to use funds from a joint venture agreement with 3KM Corporation for the payment of criminal defense fees. (App. 53-54) The record

below also indicates that the district court was aware that the Petitioner had contacted at least 15 attorneys to request *pro bono* assistance with his case as a copy of the letter making the request was provided as an attached exhibit to a *pro se* pleading requesting an extension of time. (App. 28-38) The burden placed on a *pro se* defendant by the opinion of the panel, and specifically in the case at bar where the Petitioner has not been advised of the pitfalls of *pro se* representation, is contrary to The Criminal Justice Act, the Sixth Amendment right to assistance of counsel, and the Due Process Clause of the Fifth Amendment.

The Criminal Justice Act, 18 U.S.C. § 3006A, does not require, contrary to the panel's findings, a formal request for redetermination of eligibility for appointed counsel. In fact 18 U.S.C. § 3006A(c) gives the district court the power to appoint or remove counsel at any time. Additionally, the guidelines for appointing counsel under The Criminal Justice Act promulgated by the Judicial Conference of the United States, and relied upon by the magistrate in the instant case, state that erroneous determinations can be corrected at any time. (App. 18-22) Nowhere under 18 U.S.C. § 3006A does it state that a "formal request" by a *pro se* defendant is necessary to make such a correction. Certainly this gives the district court the power to address such issues *sua sponte*, especially when presented with substantial evidence that Petitioner was unable to obtain representation.

Requiring district courts, when presented with evidence supporting a defendant's financial inability to obtain counsel, to address the issue *sua sponte* is in fact a far better alternative than requiring a formal pleading

from a *pro se* defendant. The superior ability of a district court judge to understand the legal and constitutional ramifications of uncounseled proceedings, and the ability of a district court judge to address those issues with a *pro se* defendant prior to trial, serve to protect the Fifth and Sixth Amendment rights of criminal defendants as well as the integrity of the judicial system. Further, the district courts are directed to conduct a thorough inquiry to determine whether the choice to waive the right to counsel is voluntarily and intelligently made. (*See* Reason for Granting the Writ I, *supra.*) The opinion of the panel below in essence allows district courts to ignore evidence of a defendant's financial inability to obtain counsel and places an intolerable burden on *pro se* defendants who are entitled to the right of assistance of counsel – a right this Court has recognized as crucial to our adversarial system of justice. "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' " *United States v. Cronic*, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984).

By requiring a *pro se* defendant to formally request assistance of counsel when a court is aware of a defendant's financial inability to obtain counsel creates an intolerable burden where a fundamental constitutional right is concerned. Such precedent cannot stand in light of the importance of the right to counsel.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-4127

United States of America, *
*
Appellee, *
*
v. *
*
Kenneth G. Brockman, *
*
Appellant. *

No. 98-4128

United States of America, *
*
Appellee, *
*
v. *
*
Carolyn A. Kruger, *
*
Appellant. *

Appeals from the United States District Court for the District of Nebraska.

Submitted: June 15, 1999
Filed: July 16, 1999

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and BYRNE,[1] District Judge.

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[1] The Honorable Wm. Matthew Byrne, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

BYRNE, District Judge.

Kenneth G. Brockman and Carolyn A. Kruger appeal their convictions for multiple counts of mail fraud and wire fraud, and conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. §§ 371, 1341, 1343. Kruger also appeals her sentence. We affirm.

I. BACKGROUND

Kruger was the President of Biologically Guided Life Systems, Inc. ("BGLS"), and Brockman has been variously described as the founder of BGLS and, at times, as a consultant to the company. BGLS was represented to be a research, development, and marketing company working in the field of alternative health care. Between 1984 and 1997, Brockman, Kruger, and others working at their direction represented that they were in the process of developing numerous business projects that would result in broader availability of alternative health resources and would be quite lucrative for those who assisted in bringing the projects to fruition. Among the proposals were projects involving the development of motivational tapes, infomercials, health resorts, diagnostic centers, treatment clinics, and health depots.

Over a thirteen-year period, appellants solicited more than $5,000,000 from lenders and investors while representing that their business projects were close to completion. Appellants told lenders that funds were needed for a very short period of time, until "major funding" was obtained from large-scale individual and institutional investors. Appellants further represented

that funds lent to BGLS or its principals would be repaid in a matter of weeks or months at interest rates ranging from 16% to 300% per annum. In fact, not one of the projects described to potential lenders and investors was ever developed to the point that it made money, no major funding was ever obtained, and less than $500,000 was ever repaid.[2]

Appellants also made other misrepresentations to raise money. Some lenders and investors were told, for instance, that they would be provided stock in certain companies in exchange for providing monies to BGLS and its principals. Other lenders and investors were given specific assurances that they would be repaid within thirty days upon request. Brockman told some lenders that he had multimillion dollar job offers which he could always accept as a means of paying off lenders if his projects failed. Kruger told at least one lender that she would take a job to pay back a loan if the projects did not succeed. Finally, certain lenders were told that they would be allotted area manager positions or sales territories which would allow them to participate in the marketing of BGLS' products and services. Appellants never delivered on any of these promises.

In the spring of 1996, search warrants were executed on the business premises and home of appellants. Seized during the searches were several statements prepared by Brockman and signed by Kruger in which Kruger confessed to various acts of fraud. In one, entitled "Confession

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[2] Since no projects were taken to the money-making stage, repayments to early lenders were made out of funds obtained from later lenders.

of Guilt, Admission to Criminal Activity," Kruger admitted defrauding investors by failing to disclose to them the *true risks associated with their loans* and stated that when she convinced people to become lenders, she did so "without any intention of seeing them repaid."

Appellants were indicted on April 23, 1997. Kruger moved to dismiss her indictment for unreasonable pre-indictment delay. The motion was denied, and Kruger was convicted following a jury trial of conspiracy to commit mail fraud and wire fraud, five counts of mail fraud, and one count of wire fraud. The court deemed Brockman, who was initially represented by a federal public defender, to have the financial ability to retain counsel and thus directed the public defender to withdraw from the case. Brockman proceeded to trial pro se and was convicted along with Kruger on the same counts.

The court enhanced Kruger's sentencing range under U.S.S.G. § 3B1.1 based upon her leadership role in the conspiracy and sentenced her to 39 months imprisonment. Brockman, who also received an enhancement for his role in the offense, was sentenced to 78 months imprisonment.

II. DISCUSSION

On appeal, Kruger contends that the district court erred by failing to dismiss her indictment for unreasonable pre-indictment delay and by enhancing her sentencing range under U.S.S.G. § 3B1.1. Brockman contends that the district court erred when it discharged the public defender prior to trial, failed to advise him of his Fifth

Amendment right not to testify, and permitted jurors to question witnesses.

A. Pre-indictment delay

Kruger filed a motion to dismiss the April 23, 1997 indictment for unreasonable pre-indictment delay under the Fifth Amendment. Kruger argued that the government should have brought an indictment no later than 1992 and suggested that the government's five-year delay prejudiced her through the loss of crucial witness testimony and other evidence. Kruger specifically identified four witnesses as unavailable. The first, a lender who had been substantially repaid, had passed away. The second, an investor and staunch supporter of BGLS, had been incapacitated by a stroke. The third and fourth witnesses, a lender and a strong supporter of appellants' businesses, respectively, had also passed away.

While "[s]tatutes of limitation provide the primary guarantee against prosecution of a defendant on overly stale charges," the due process clause does have "a 'limited role to play in protecting against oppressive delay.' " *United States v. Bartlett*, 794 F.2d 1285, 1289 (8th Cir. 1986) (quoting *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). Pre-indictment delay is sufficiently "oppressive" to warrant dismissal of an indictment where the delay is unreasonable and the defendant is actually and substantially prejudiced in the presentation of her case. *See id.* The actual and substantial prejudice issue is ordinarily considered first. *See United States v. Benshop*, 138 F.3d 1229, 1234 (8th Cir. 1998).

A defendant bears the burden of proving actual and substantial prejudice attributable to pre-indictment delay. *See Lovasco*, 431 U.S. at 789-90; *Bartlett*, 794 F.2d at 1289. "To prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government." *Bartlett*, 794 F.2d at 1289. It is not sufficient for a defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time. *See id.* at 1289-90; *see also United States v. Marion*, 404 U.S. 307, 325-26 (1971). Nor may a defendant establish actual prejudice without "relat[ing] the substance of the testimony which would be offered by the missing witnesses or the information contained in lost documents in sufficient detail to permit a court to assess accurately whether the information is material to the accused's defense." *Bartlett*, 794 F.2d at 1290. Finally, it is defendant's burden to show that the lost testimony or information is not available through another source. *See id.*

The district court found no actual and substantial prejudice from the pre-indictment delay. The court emphasized that the lenders who were unavailable to testify represented only four of approximately 260 lenders to BGLS and its principals. As recently as 1994, defendants had received more than sixty lender statements in which individuals who had provided funds to BGLS stated that they were not fraudulently induced to loan money and that they knew that their funds were to be used for "personal and business expenses." Finally, the district court noted that appellants had retained impeccable documentary evidence of their business transactions

that could establish the fact of repayment to lenders who were no longer available to testify.

The district court's finding was not clearly erroneous. *See id.* at 1291 n.7 (district court's findings with respect to prejudice from pre-indictment delay reviewed for clear error). Even assuming that Kruger offered sufficiently detailed allegations of what the four unavailable witnesses would have said had they testified, Kruger did not sustain her burden of establishing actual and substantial prejudice from the delay. Specifically, Kruger failed to show that any of the lost testimony was not available through other sources. The fact that one or more of the unavailable lenders had been repaid could be established through documentary evidence, and several hundred other lenders, including approximately sixty lenders who had expressed satisfaction with appellants' handling of their loans, remained available to testify.[3]

On appeal, Kruger also suggests a second type of prejudice that stemmed from the pre-indictment delay, that being the higher sentence she faced as a result of increasing amounts of loss throughout the period of

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[3] While Kruger contends that she should have been excused from the usual burden of proving actual and substantial prejudice in light of the scope of conspiracy alleged and the failure to issue a bill of particulars, she offers no support for this proposition. In any event, Kruger had all of the information she needed to identify actual and substantial prejudice without a bill of particulars. Appellants' own records identified each of the lenders with whom they had dealt over the life of the alleged conspiracy, and the district court required the government to disclose the identities of those persons with whom appellants were alleged to have conspired.

delay. This allegation of prejudice is more creative, but ultimately no more meritorious, than the first. It is questionable whether an increased sentence is the type of prejudice against which the Fifth Amendment is intended to protect, i.e., prejudice to a defendant "in the presentation of his case." *Id.* at 1289. Moreover, while we have not addressed claims of sentencing prejudice in the Fifth Amendment context, we have rejected analogous claims of "sentencing entrapment" in challenges to actual sentences imposed. *See, e.g., United States v. Lenfesty,* 923 F.2d 1293, 1300 (8th Cir. 1991).

Several other circuits have more directly considered and rejected claims of sentencing prejudice in the Fifth Amendment context. In *United States v. Spears,* 159 F.3d 1081 (7th Cir. 1998), the Seventh Circuit considered a defendant's argument that he had been prejudiced by pre-indictment delay because, during the time between the offense and the indictment, he had accumulated seventeen additional criminal history points. The court analogized the defendant's claim to one of sentencing manipulation and rejected the claim, noting that "[a]ny sort of prejudice [defendant] may have suffered was the result of his own criminal conduct, and not from any government misconduct." *Id.* at 1086.[4] In *United States v.*

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[4] While the additional criminal history points in *Spears* stemmed from conduct unrelated to the offense of conviction, the due process implications are the same where a defendant's later conduct forms part of the charged offense. *See United States v. Music,* 1998 WL 609719, at *2 (4th Cir. Sept. 1, 1998) (unpublished opinion) ("The Government's conduct in this case, simply letting fraudulent transactions continue, does not amount to outrageous conduct resulting in a due process violation.").

Martinez, 77 F.3d 332 (9th Cir. 1996), the Ninth Circuit reached the same result on different grounds, holding that any sentencing prejudice caused by pre-indictment delay is too speculative to implicate a due process right. *Id.* at 336-37. The court emphasized that "[t]he sentencing guidelines are not the procrustean bed sometimes supposed" and that a district court may make a downward departure to account for the harshness of a sentence attributable to pre-indictment delay. *Id.*

Because we have previously rejected sentencing claims analogous to Kruger's, and other circuits have uniformly rejected these same claims in the Fifth Amendment context, the district court did not err in denying Kruger's motion to dismiss her indictment for unreasonable pre-indictment delay.

B. Discharge of court-appointed counsel

During the years leading up to his indictment, Brockman had employed the services of attorney Michael Pistillo. Following the issuance of a civil injunction in May 1996, Pistillo advised Brockman to request a public defender. An attorney from the Federal Public Defender's Office was appointed and thereafter represented Brockman in pre-indictment criminal matters. Following Brockman's indictment, and upon review of the Pretrial Services Report, the government filed a Motion to Determine Eligibility for Appointed Counsel. The magistrate judge found that defendant was financially able to obtain counsel and directed the public defender to withdraw from the case. The district court rejected Brockman's

appeal of the magistrate judge's ruling. Brockman proceeded to trial pro se.[5] Brockman contends that the district court erred when it discharged the public defender in violation of his Fifth and Sixth Amendment rights.

The Criminal Justice Act ("CJA") was passed by Congress in 1964 "to insure that defendants who are financially unable to afford trial services necessary to an adequate defense are provided them in accordance with the Sixth Amendment to the United States Constitution." *United States v. Barcelon*, 833 F.2d 894, 896 (10th Cir. 1987). Counsel must be appointed under the CJA if the court is satisfied after "appropriate inquiry" that the defendant is "financially unable to obtain counsel." 18 U.S.C. § 3006A(b); *see Barcelon*, 833 F.2d at 897. When requesting the appointment of counsel, the burden is on the defendant to show that he is "financially unable" to afford representation. *See United States v. Lefkowitz*, 125 F.3d 608, 621 (8th Cir. 1997). Financial inability to pay "is not the same as indigence or destitution," *Museitef v. United States*, 131 F.3d 714, 716 (8th Cir. 1997), and doubts as to eligibility should be resolved in a defendant's favor. *See United States v. Harris*, 707 F.2d 653, 660 (2d Cir. 1983). The district court's assessment of a defendant's ability to afford representation is reviewed for clear error. *See United States v. O'Neil*, 118 F.3d 65, 74 (2d Cir. 1997); *United States v. Kane*, 955 F.2d 110, 112 (1st Cir. 1992).

The district court's factual determination that Brockman was financially able to afford representation was not

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[5] Brockman did retain counsel to represent him at the sentencing stage, and Brockman is also represented on appeal.

clearly erroneous. The evidence presented showed that Brockman received "living expenses" of about $10,000 a month pursuant to a joint venture agreement he had with a company named 3KM. Among Brockman's monthly "living expenses" were lease payments on four automobiles totaling nearly $2,300 per month, "dependent" support expenses of $1,500 per month, and groceries and nutritional expenses of $1,340 per month. The itemized expenses Brockman submitted in connection with his appeal of the magistrate judge's ruling on the motion further revealed monthly payments of $200 a month for cellular phone service on five phones and at least periodic payments on credit cards belonging to persons other than Brockman's "dependents."

Given the broad range of "living expenses" for which Brockman received funds under the joint venture agreement, it was not clearly erroneous for the court to find that Brockman could obtain reimbursement for legal fees. Nothing in the joint venture agreement precluded reimbursement for legal fees, and Brockman never called the principals of 3KM to testify nor provided any written correspondence from them in connection with the government's motion or his appeal of the magistrate judge's ruling.[6] Moreover, Brockman's itemized expenses for

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[6] It was not until several months after the public defender had withdrawn from the case that Brockman first submitted correspondence from 3KM purporting to preclude reimbursement for criminal defense fees. Brockman submitted the correspondence in connection with a request for CJA funds to retain investigators and cover such expenses as computer-assisted legal research and filing fees. However, Brockman never moved for reconsideration of the district court's ruling on

April 1997 included a $250 payment to attorney Pistillo for "legal services." While Brockman contends that the court should have gone further in attempting to ascertain whether reimbursable "living expenses" under the joint venture agreement included criminal defense fees, it is Brockman who bore the burden of establishing his inability to afford representation. Despite numerous filings and appearances before the magistrate judge and district court, Brockman failed to satisfy this burden.[7]

C. Fifth Amendment right not to testify

Brockman next contends that his Fifth Amendment rights were violated by the district court's failure to advise him of his right not to testify. Brockman recognizes that the district court does not ordinarily have a duty to sua sponte advise a defendant of his right not to testify. Brockman suggests, however, that the court acquires such a duty where the defendant is proceeding pro se.

We need not decide this issue as the district court did advise Brockman, before he took the stand, of his right

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his eligibility for appointed counsel after the correspondence had finally been provided to the court.

[7] While Brockman also asserts an ineffective assistance of counsel argument, contending that his own pro se representation was not objectively reasonable and prejudiced his defense, it is well established that a defendant who exercises his right to appear pro se cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *see also United States v. Baker*, 84 F.3d 1263, 1267 (10th Cir. 1996).

not to testify. If there was any doubt that Brockman understood this right, one need look no further than Brockman's own closing argument to the jury:

> Obviously in cases that at least are publicized the defendants seldom ever testify. And there is a reason for that, because, number one, they don't have to. And if they don't have to, then if they feel uncomfortable about what might happen if they do testify, they usually choose not to. That option was made to me and I chose to testify, and the reason I chose to testify is I know in my heart I have nothing to hide.

(Tr. at 2308-09). Thus, even if the court had a duty to advise Brockman of his right not to testify, Brockman's Fifth Amendment claim would fail.

D. Questioning by jurors

Brockman's final contention is that the district court erred in permitting jurors to ask questions of the witnesses during the course of the trial, thus placing jurors in the role of advocates rather than impartial factfinders. We have previously held that "the practice of allowing juror questions is a matter committed to the sound discretion of the district court and is not prejudicial *per se.*" *United States v. George* 986 F.2d 1176, 1178 (8th Cir. 1993). Because Brockman failed to object to juror questioning at trial, review is for plain error. *See United States v. Tulk*, 171 F.3d 596, 599 (8th Cir. 1999).

In *United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993), we held that allowing jurors to ask questions of

witnesses is not plain error. "Various panels of this circuit, nonetheless, have expressed considerable uneasiness about the practice, especially where . . . the individual jurors posit questions within the hearing of the whole jury." *Id.*

> The reasons given for being skeptical of the procedure . . . are that juror questioning may tend to transform jurors from neutral fact finders into advocates, that the process of formulating questions may precipitate prematurely the deliberation phase of trial, that jurors may weigh more heavily the answers to questions from each other than the answers to questions from counsel, that jurors may ask questions about legally irrelevant and legally inadmissible evidence, and that an objecting party risks alienating the jury.

Id.; *see also United States v. Bascope-Zurita*, 68 F.3d 1057, 1064 (8th Cir. 1995).

Notwithstanding the risks inherent in juror questioning, the procedure the district court employed in this case conformed to our prior directives. *See George*, 986 F.2d at 1179 (finding no prejudice where jurors directed questions to the bench and, if the court deemed the question proper, the witness was instructed to answer it); *see also United States v. Land*, 877 F.2d 17, 19 (8th Cir. 1989) (finding no prejudice even though juror questions were stated out loud before the court had ruled them proper). Indeed, the procedure employed in this case mirrored that suggested in *Groene*: "[I]f juror questions are allowed, the trial court should carefully weigh using a procedure that requires those questions to be submitted in writing or out

of the hearing of (and without discussion with) other jurors." *Groene*, 998 F.2d at 606.

Because Brockman has identified no more than speculative prejudice from the district court's procedure or from juror questioning generally, the district court did not commit plain error.

E. Sentencing enhancement for role in offense

Kruger's final contention is that the district court improperly enhanced her sentence under U.S.S.G. § 3B1.1 when it increased her offense level by four because of her role in the offense. Section 3B1.1(a) provides for an [sic] four-level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." To qualify for an adjustment, the defendant must have been the organizer or leader of one or more "participants," § 3B1.1, comment. n.2, with a "participant" defined as "a person who is criminally responsible for the commission of the offense." § 3B1.1, comment. n.1. Persons who are not indicted or tried, but who are nonetheless criminally responsible for defendant's crime, are "participants" under § 3B1.1. *See* § 3B1.1, comment. n.1; *United States v. Freeman*, 30 F.3d 1040, 1042 (8th Cir. 1994).

Section 3B1.1 employs a "broad definition" of what constitutes an organizer or leader, and "[a] defendant need not directly control others in the organization to have functioned as an organizer." *United States v. Morris*, 18 F.3d 562, 569 (8th Cir. 1994). Among factors considered in evaluating a defendant's role in the offense are

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning and organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

§ 3B1.1 comment. n.4; *see also United States v. Maejia*, 928 F.2d 810, 816 (8th Cir. 1991).

A § 3B1.1(a) enhancement may be imposed on the organizer or leader of a criminal activity that involved fewer than five participants if the criminal activity "was otherwise extensive." The "otherwise extensive" language "refers to the number of persons involved in the operation, and includes all persons involved during the course of the entire offense, including outsiders who did not have knowledge of the facts." *United States v. West*, 942 F.2d 528, 531 (8th Cir. 1991) (internal quotations and citations omitted). While extensiveness is generally determined based upon the number of persons involved in the commission of an offense, courts also consider the amount of loss caused by the offense. *See, e.g., Morphew v. United States*, 909 F.2d 1143, 1145 (8th Cir. 1990) ("Whether or not there were five or more persons involved, it is plain that an enterprise generating a 'take' of over a quarter million dollars can properly be regarded as 'extensive.' ").

The district court's finding that Kruger was a leader or organizer is amply supported by the record, and Kruger does not attack this finding. Kruger instead contends that the district court erred in finding that there

were at least five participants in the offense or, alternatively, that the criminal activity was otherwise extensive. The district court, however, specifically identified four people who appeared to be participants for purposes of § 3B1.1(a) and noted that other "con men" were brought in to give legitimacy to the business. The court also found that the $5.8 million, thirteen-year scheme was otherwise extensive for purposes of enhancement, pointing out that a number of other people had been used, "wittingly or unwittingly, to make this work." Neither of these findings was clearly erroneous. *See United States v. Dijan*, 37 F.3d 398, 403 (8th Cir. 1994) (district court's determination of defendant's role in an offense reviewed for clear error).[8]

III. CONCLUSION

For the foregoing reasons, we AFFIRM appellants' convictions and Kruger's sentence.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8] In her reply brief, Kruger also contends that the district court engaged in impermissible double counting by enhancing her sentence under U.S.S.G. §§ 2F1.1 and 3B1.1. This contention, and each of the other contentions raised for the first time in the reply brief, lack merit. *See United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993) (rejecting an identical double-counting argument).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH G. BROCKMAN, Defendant,	8:97CR79 ORDER (Filed 97 May 19)

The government's Motion to Determine Eligibility for Appointed Counsel (#4) came on for hearing May 15, 1997. Evidence was taken and oral argument was heard. Because I find defendant does not meet the eligibility criteria of the Criminal Justice Act or its guidelines, I will grant the government's motion, order the Federal Public Defender to withdraw, and require that defendant retain private counsel or proceed pro se.

The parties agree about the law which governs my review of defendant's eligibility for appointed counsel. The standard set forward in the Criminal Justice Act is that counsel shall be appointed for persons who are "financially unable to obtain counsel." 18 U.S.C. § 3006A(b). The guidelines governing my interpretation of financial eligibility have been established by the Judicial Conference of the United States.

> A person is "financially unable to obtain counsel" within the meaning of subsection (b) of the Act if his net financial resources and income are insufficient to enable him to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to

> (a) the cost of providing the person and his dependents with the necessities of life. . . .
>
> Any doubts as to a person's eligibility should be resolved in his favor; erroneous determinations of eligibility may be corrected at a later time.

Guidelines at § 2.04.

In *United States v. Cohen*, 419 F.2d 1124 (8th Cir. 1969), in reviewing an earlier version of the District of Nebraska's plan for appointment of counsel for defendants, the court held that indigency for purposes of appointment of counsel is not "necessarily equatable with destitution." *Id.* at 1127. The issue is whether the defendant can, in fact, afford to employ an attorney. The eligibility standard established in 18 U.S.C. § 3006A "means something less than indigency or destitution." *United States v. Harris*, 707 F.2d 653, 660 (2nd Cir. 1983).

The evidence presented established that defendant receives a monthly income of $10,000, pursuant to a joint venture agreement (Ex. 1) between 3KM located in Sabetha, Kansas and Kenneth G. Brockman. Pursuant to the agreement, 3KM has the following responsibility: "Providing the capital needed to compensate KGB [defendant Brockman] for his living expenses as well as to develop, market and distribute the products and services contemplated by this agreement. All expenses will be approved by 3KM on a routine basis." (Ex. 1 at § 1B (#1)). Apparently, it is pursuant to this paragraph that 3KM provides defendant Brockman $10,000 in living expenses. An examination of the agreement indicates that an indemnification clause suggests that 3KM will indemnify and defend KGB, including costs for attorney's fees if the

litigation arises from the relationship between 3KM and defendant. No other reference to attorney's fees is made in the agreement. Nothing in the agreement limits the definition of defendant's "living expenses." While defendant argues that the phrase does not cover attorney's fees, nothing suggests that self-serving limitation. Based upon the expenditures defendant has been making, the evidence establishes that the phrase is interpreted very broadly.

Defendant has three daughters, ages 23, 21 and 19. His 23 year old daughter resides in Lincoln, Nebraska, and no information suggests that she is a student. The daughters aged 21 and 19 are both reported to be students at the University of Nebraska in Lincoln. Evidence submitted during the hearing establishes that defendant leases, in the name of his wife Kathleen Brockman, vehicles for these three daughters. The automobiles leased are as follows: a 1994 Ford Mustang leased at $413.62 a month; a 1996 Ford Explorer leased at $557.13 a month; and a 1994 Nissan 240SX leased at $418.18 a month. In addition, defendant leases for himself a 1996 Ford van a the cost of $903.68 a month. The van's lease includes a charge for excess mileage. The lease payments alone, along with the related automobile insurance, total $38,000 annually. In addition, Mr. Brockman reports a fifteen hundred dollar monthly cost for "dependents" and $1,340 in monthly expenses for groceries and nutrition.

While indigency is not required to qualify for appointed counsel, defendant is also not in a position to make himself a pauper by exorbitant expenditures, thereby, qualifying for appointed counsel. Two of defendant's

three daughters are adults and, therefore, are not dependants who would qualify for defendant's continued support, let alone the excessive automobile lease payments the evidence establishes. In fact, automobile leases, vehicle insurance, groceries and nutrition account for more than $50,000 annually of defendant's $120,000 annual income.

I find that defendant is not "financially unable" to obtain counsel in this case, One solution permitted under the Criminal Justice Act is to require defendant to pay "available excess funds to the Clerk of the Court at the time of such appointment or from time to time thereafter." Guidelines at § 205. In this case, the court has considered requiring defendant to pay a monthly fee to the Clerk of the Court of $3,500. Such a solution would remedy defendant's argument that there is no defense counsel available to take this case without a substantial retainer. However, the difficulty of such an arrangement is that the Federal Public Defender would very quickly become embroiled in a case involving literally ten thousands of pages of documents and ten years of alleged mail fraud and wire fraud. Should defendant Brockman then choose to cease making the payments, the court would be faced with the dilemma of discharging the Federal Public Defender and requiring a substantial waste of resources for the government and new defense counsel to re-prepare the case. For that reason, the better solution at this early stage of the proceedings is to discharge the Federal Public Defender and require defendant to retain private counsel or proceed pro se.

IT IS ORDERED that:

1. The Motion to Determine Eligibility for Appointed Counsel (#4) is granted;

2. The Federal Public Defender is ordered to withdraw from the representation of defendant Kenneth G. Brockman;

3. Defendant Brockman is advised that, barring the entry of appearance of counsel, he will be required to proceed pro se in this matter;

4. This order is held in abeyance for a period of eleven (11) days in order to provide the parties the opportunity to appeal the order to the trial court.

Pursuant to NELR 72.3, any appeal of this order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this order. Failure to timely appeal may constitute a waiver of any such objection. The brief in support of any appeal shall be delivered to Judge Thomas M. Shanahan at the time of filing such appeal. Failure to submit a brief in support of any appeal may be deemed an abandonment of the appeal.

DATED this 19th day of May, 1997.

BY THE COURT:

/s/ Kathleen A. Jaudzemis
KATHLEEN A. JAUDZEMIS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH G. BROCKMAN, Defendant.	)	8:97CR79 MEMORANDUM AND ORDER (Filed Jun. 12, 1997)

Before the court is filing no. 24, the "Appeal of Magistrate's Order Directing The Federal Public Defender To Withdraw" filed by the defendant, Kenneth G. Brockman, who appeals the May 19, 1997 "Order" (filing no. 19) of Magistrate Judge Kathleen A. Jaudzemis who concluded that, "Brockman is not eligible for appointed counsel and that the Federal Public Defender is ordered to withdraw from this case."[1] The court has reviewed the audiotapes of the hearing conducted by Magistrate Judge Jaudzemis on May 15, 1997. Moreover, the court has reviewed the defendant's response to the government's motion for withdrawal of appointed counsel and the pretrial services report, both of which Magistrate Judge Jaudzemis took judicial notice of during the hearing.

An order of a magistrate judge in a nondispositive matter may be set aside only if the appealed order is "clearly erroneous or contrary to law." 28 U.S.C.

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[1] By letter to the court, Brockman has requested an expedited review of his appeal and states that counsel for the plaintiff, Assistant United States Attorney, Jan Sharp, will not be submitting a brief in response to Brockman's appeal.

§ 636(b)(1)(A); NELR 72.3(d). A decision is clearly erroneous "where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. U.S. Gypsum Co.*, 68 S. Ct. 525, 542 (1948); see also *United States v. Williams*, 77 F.3d 1098 (8th Cir. 1996).

18 U.S.C. § 3006A(b) provides that counsel shall be appointed for individuals who are "financially unable to obtain counsel." According to § 2.04 of the guidelines established by the Judicial Conference of the United States:

> A person is "financially unable to obtain counsel" within the meaning of [18 U.S.C. § 3006A(b)] if [the person's] net financial resources and income are insufficient to enable [the person] to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to (a) the cost of providing the person and his dependents with the necessities of life. . . . Any doubts as to a person's eligibility should be resolved in [the person's] favor; erroneous determinations of eligibility may be corrected at a later time.

At the hearing before Magistrate Judge Jaudzemis, United States Postal Investigator Michael Jones testified that Brockman apparently holds title to no assets and has no bank accounts, despite the fact that Brockman allegedly received over five million dollars since 1985.[2]

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[2] Brockman has resided at 810 South Fillmore Street, Papillion, Nebraska for the past 10 years. Although title to the

According to the calculations attached to the defendant's brief in support of his appeal from Magistrate Judge Jaudzemis' "Order" (filing no. 19), Brockman received $12,933.36 In "living expenses" for the month of April, 1997 as a result of a joint venture agreement (filing no. 12) entered into by Brockman and 3KM, a company located in Sabetha, Kansas.[3] Among those living expenses were leases for three automobiles driven by Brockman's daughters, reflecting total rental payments of approximately $1400 per month, and a $900 per month lease payment for a van driven by Brockman. Additionally, 3KM apparently paid various credit card bills, health insurance, storage garages and numerous other items on behalf of Brockman. In view of these expenditures, the court concludes that Magistrate Judge Jaudzemis' decision that, the phrase "living expenses" has been broadly defined by the 3KM and Brockman is neither clearly erroneous nor contrary to law.

The court has considered Brockman's contention that "living expenses," such as that phrase appears in the joint

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home apparently is not in Brockman's name, no evidence was adduced during the hearing as to who actually owns the residence. The court notes that, according to Brockman's own expense records, Brockman pays no rent. Brockman did pay the following household expenses during April, 1997: cable television ($85.22); phone for business and personal ($258.66, $660.64, $201.65, $481.53 (total = $1, 602.48)); gas ($119.73); water ($58.52 and $45.59); lawn fertilizing ($125); electricity ($117.88); and trash collection ($22.00.)

[3] The court will attach a copy of the itemization of expenses for April, 1997 to this "Memorandum and Order" as "Exhibit 1."

venture agreement, does not include attorney's fees.[4] However, given the breadth by which Brockman and 3KM have defined "living expenses" in the past, Brockman's argument is, as Magistrate Judge Jaudzemis found, a "self-serving limitation." Additionally, the court notes that one of the "living expenses," apparently paid pursuant to the joint venture agreement during the month of April, 1997, was a $250.00 bill to Pistillo & Pistillo for "legal services." During the hearing, counsel for the government and counsel for the defendant indicated that Michael Pistillo has previously been retained by Brockman for legal representation in Brockman's dealings with the government.[5] Consequently, it appears that the joint venture agreement covers at least a part of Brockman's legal fees.

Moreover, no evidence shows or even indicates that Brockman is not capable of finding additional employment to obtain funds to pay for retained counsel.

Consequently, the court finds and concludes that Magistrate Judge Jaudzemis' conclusion that Brockman is financially able to obtain counsel in this action is neither clearly erroneous nor contrary to law. Brockman, whose income was nearly $13,000 in the month of April, 1997,

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[4] Defendant asserts that he has additional evidence to support his argument, but that such evidence was not presented to Magistrate Judge Jaudzemis. The court will not consider additional evidence on an appeal from a nondispositive motion. NELR 72.3(c).

[5] A temporary injunction has been entered against Brockman and others in *United States v. Kenneth Brockman et al.*, 8:96CV251 (D. Neb.).

appears financially capable of retaining his own counsel and, in any event, as concluded by Magistrate Judge Jaudzemis, Brockman is not entitled to court-appointed counsel under the circumstances.

THEREFORE, IT IS ORDERED:

(1) That filing no. 24, the "Appeal of Magistrate's Order Directing The Federal Public Defender To Withdraw" filed by the defendant, Kenneth G. Brockman, is denied;

(2) That the "stay" (filing no. 21) , entered by Magistrate Judge Jaudzemis, is dissolved;

(3) That the Federal Public Defender shall withdraw from the representation of the defendant, Kenneth G. Brockman; and

(4) Defendant Brockman is advised that, barring the entry off appearance of substitute and successor counsel in place of the Federal Public Defender, Brockman will be required to proceed pro se in this matter.

DATED this 12th day of June, 1997.

BY THE COURT:

/s/ Thomas M. Shanahan
THOMAS M. SHANAHAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	**8:97CR79-1**
Plaintiff,	)	**MOTION FOR EXTENTION OF TIME TO PREPARE PRETRIAL MOTIONS NECESSARY TO DEVELOP AN ADEQUATE DEFENSE**
vs.	)	
KENNETH G. BROCKMAN,	)	
Defendant.	)	

Comes now Kenneth G. Brockman, defendant herein, before the United States District Court for the District of Nebraska requests an extension of time necessary to determine through investigation and further evidence review the need of further pretrial motions that must be filed in order to present a competent defense. In support of this motion, the defendant presents to the court the following facts:

1. Since the pretrial scheduling conference held on July 30, 1997, the defendant reviewed the interviews of the individuals stated in the indictment, numerous interviews of potential witnesses and certain discovery information all gathered by the government. From so doing, the defendant has found that he needs considerable time to examine all documents and to investigate potential witnesses before he can determine what pretrial motions are appropriate. He then needs to prepare all pretrial motions that will determine the true nature of his defense. Without the aid of an attorney or significant personnel necessary to develop his defense, it requires more time from the defendant than he realized. A local attorney,

Mr. Michael Bianchi, stated to the defendant that this is an "office-stopping" case due to a voluminous amount of documents and records, the number of potential witnesses, the length of time and the amount of money involved, and the uniqueness of the defendant's position. Please see letter dated 5-27-97 from Mr. Jan Sharp to Mr. Shannon O'Connor hereto attached as Exhibit 1 and indictment hereto attached as Exhibit 2.

2. Due to the lack of personal expenses designated for criminal defense fees in regard to the defendant's joint-venture agreement with 3KM, the inability of the defendant to obtain a personal loan for legal fees, the fact that there were no funds remaining from the monies loaned from past lenders and the defendant's inability in securing an attorney pro bono, the defendant has had to proceed pro se. The defendant previously sent letters to 15 attorneys asking them to consider taking his case pro bono but none of them accepted. Please see copy of pro bono letter and list of attorneys contacted as Exhibit 3.

3. Since the defendant must work full-time to provide a livelihood for his family, he does not have the same amount of time, legal training nor personnel as is available to attorneys who prepare their clients' cases as their means of livelihood.

4. To the defendant's knowledge, the federal government through its various agencies has had at least the last six years to investigate the defendant's activities, has secured voluminous amount of materials including records obtained from a search-and-seizure at least one year prior to the indictment, has interviewed approximately 100 potential witnesses, and has secured testimonies from Grand Jury sessions from as early as 1994.

The government has had more than one-and-a-half years to review the 40 boxes of documents obtained from the search-and-seizure and possesses Grand Jury transcripts that are still unavailable to the defendant. Thus, the prosecution has had much more time and resources to develop its case. Furthermore, Mr. Sharp, U.S. Assistant Attorney, has indicated in his letter to Mr. O'Connor dated May 27, 1997 that the investigation would be ongoing. Please see letter dated 5-27-97 from Mr. Jan Sharp to Mr. Shannon O'Connor hereto attached as Exhibit 1 and search warrant attached as Exhibit 4.

5. From the defendant's review of the evidence and supporting documentation since the pretrial hearing, the defendant has recognized that to efficiently and competently prepare his defense, he needs an audited accounting of all expenditures over the 12-year period in question as well as necessary personnel, including but not limited to legal advisors, investigators, a secretary and computer-assisted legal research to prepare the necessary pretrial motions and, thus, a competent defense. Also, the defendant recognizes he may not be able to interview witnesses with the same objectivity that investigators have and, even if he could, he realizes his actions may still be construed as trying to influence potential witnesses. Therefore, the defendant has submitted to the court a motion to acquire governmental funds based on the Criminal Justice Act. Please see defendant's "Motion To Acquire Criminal Justice Act Funds To Prepare And Present An Equitable Defense" as Exhibit 5.

6. At the pretrial hearing, Judge Jaudzemis asked the parties involved for a date they anticipated

would provide them adequate time to file pretrail motions. However, she advised the involved parties she was aware they might need additional time due " . . . to the complexity of this case" and that " . . . this case was unusual," and said that if more time was needed, she was sure she would be notified. Please see "Order" dated August 12, 1997, signed by Judge Jaudzemis attached as Exhibit 6.

7. The defendant submitted to the court an affidavit agreeing to waive speedy trial rights and agreed to the dates set at the pretrial hearing with the understanding that the parties to the case may later advise the court of the need for more time to prepare. Please see "Affidavit to Waive the Right to Speedy Trial" signed by defendant on August 8, 1997, and hereto attached as Exhibit 7.

In consideration of the facts presented in this motion, the defendant respectfully requests that the court grant this extension of time so that the defendant has the necessary time to sufficiently prepare the pretrial motions and, thus, a competent defense. The defendant requests an additional extension of 180 days to investigate potential witnesses and review all evidence. At the end of this extension, another pretrial scheduling conference would be necessary. At that time, the defendant would be far more prepared to intelligently determine the time it will take for him to submit all his pretrial motions. The defendant would know if his motion for Criminal Justice Funds has been granted and the money available for his defense. Just as Judge Jaudzemis had a concern in her order that if she did not extend the initial time deadlines there could be a miscarriage of justice, it is the defendant's belief that failure to grant additional time of 180

days now would, indeed, result in a miscarriage of justice. Please see "Order" hereto attached as Exhibit 6.

Respectfully submitted,

KENNETH G. BROCKMAN,
Defendant

/s/ Kenneth G. Brockman
810 South Filmore Street
Papillion, NE 68046
Telephone No. (402) 339-8018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing MOTION FOR EXTENSION OF TIME TO PREPARE PRETRIAL MOTIONS AND A COMPETENT DEFENSE was duly served upon Jan Sharp, Assistant United States Attorney, at P.O. Box 1228, DTS, Omaha, NE, 68101-1228, and James Regan, 1905 Harney, #710, Omaha, NE, 68102 by regular United States mail, postage prepaid, on the 30 day of October, 1997.

/s/ Kenneth G. Brockman
Defendant

Exhibit 3

KENNETH G. BROCKMAN, D.C.

July 15, 1997

Dear:

My name is Kenneth G. Brockman. I am a 1974 graduate of Palmer College of Chiropractic. I received numerous academic and professional awards and graduated magna cum laude. I owned and operated one of the most successful natural-health-oriented chiropractic clinics in the country. Twenty years ago I developed a system of patient analysis and treatment and taught it to doctors nationwide. This system enabled the doctor to successfully apply therapeutic nutrition to their patient protocol as an adjunct to chiropractic care. It was based on the use of standard medical data to determine nutritional needs of patients on an individual basis. According to an industry survey at that time, approximately sixty percent of prevention-oriented and chiropractic physicians used my system.

I have been in privately funded study for the past 12 years. My reason for going into private study was due to my encounter with the political regulators of health care and my disagreement with the practice of treating people as a labeled disease rather than determining their individual health needs. I have spent this time researching the cause of why and how an individual develops a particular disease and what can be done to assist the body in reversing that process. This has required more time and money than anticipated.

You may have heard or read about my case in the local media. The government has charged me with conspiracy to defraud using wire and mail. In April of this year, I was indicted by a Federal Grand Jury, formally arraigned and then released on my own recognizance. The indictment involves eight counts.

Following a civil injunction in May of 1996, my attorney advised me to request a public defender. He made this recommendation based on several factors: (1) By agreeing to sign the civil injunction, I was unable to accept any more personal loans to carry on my work, (2) the money I had borrowed from lenders had been for previous business and personal expenses, (3) I have no personal assets, and (4) my credit had reached its limit. I was represented by a public defender for almost a year until I was indicted. Once indicted, the Asst. U.S. Attorney contested his appointment, causing the magistrate judge to order his discharge, which was recently upheld by the trial judge after an appeal. My public defender admitted he had underestimated the necessity of presenting evidence concerning the contesting of his appointment.

I have never conspired nor defrauded anyone using any means. The people who made loans to me did so because they recognized the immense potential of what I could do, resulting from my pioneering work in determining nutritional needs on an individual basis. As you know, people lose money in investments and loans every day. Having integrity, I felt it was my obligation to personally guarantee each loan, which is something rarely done by people offering investments or loans. (People who are frauds would never make such a guarantee.) Yet,

people who make financial offers that go unfulfilled, are seldom questioned by the government, let alone prosecuted.

Twenty years ago I was considered ahead of my time by my professional peers. What I taught chiropractors back in the late '70s and early '80s is now found in standard medical, biochemistry texts. Also, due to the influence of HMO's and PPO's, chiropractors today are finding the need to practice alternative health care as I did 20 years ago. In the past, most chiropractors chose to practice a conservative orthopedic form of chiropractic care so they could receive compensation from insurance companies. Now that HMO's and PPO's seldom cover chiropractic care, chiropractors realize the need to get involved in practicing alternative heath care because patients are willing to pay out-of-pocket for these services. I had stressed to doctors 20 years ago that using alternative methods as an adjunct to chiropractic was a good practice-building tool and now this topic is the current subject of numerous articles found in professional journals.

Just as it has taken a long time for the chiropractor to accept what I had practiced and taught, the general public also has taken much longer to accept and appreciate the need for my health concepts. It appears that the public now is ready and eager for what I have learned as people appreciate being treated as an individual rather than as a labeled condition.

In regards to my legal matter, I first learned of the federal government's investigation early in 1991. The federal prosecutor subpoenaed some of my associates for

Grand Jury testimony. I offered to testify before the Grand Jury and also asked for an opportunity to meet with the prosecutor to answer any questions. Instead of testifying before the Grand Jury, the prosecutor agreed to meet with me.

For the last five years, I heard nothing from the federal government. Then, in March of 1996, a search-and-seizure occurred of both my home and office. After working with the public defender for nearly a year, I agreed to testify before the Grand Jury in hopes that my testimony might prevent an indictment. It did not stop the indictment, however, no perjury charges have yet resulted.

As you may have already concluded, I don't have the finances to pay for my defense at this time. I need an attorney who is willing to take this case "pro bono," at least temporarily. Presently, I am in the process of getting my work out to a national market and although there has been several twists in the road, I believe the final product will produce profits sufficient to cover any attorney fees.

If you choose to represent me, you will be engaged in a high-profile case for this metropolitan area. My case has already been covered to a considerable extent by the local media. I believe I have a winning case and, if that should occur, your professional reputation could very well be enhanced. In addition, what I am doing to benefit people's health is currently a highly publicized and emotionally charged issue. The attorney willing to take my case pro bono could find the respect he wins from the public by supporting my cause to help others will far surpass his immediate financial gain.

I am innocent of the charges brought against me. I need an attorney pro bono to prove that in a court of law. If you are interested, please call me at 597-9445. This is thanking you in advance for taking the time to review this letter.

Sincerely,

Kenneth G. Brockman, D.C.

KGB/cak

List of Attorneys
Receiving the Letter
from Kenneth G. Brockman
Requesting Pro Bono Legal Counsel

1. Mr. J. William Gallup
1001 Farman St.,
Suite 300
Omaha, NE 68102

2. Mr. James E. Schaefer
1001 Farman St.,
Suite 300
Omaha, NE 68102

3. Mr. James Martin Davis
1623 Farman St.,
Suite 500
Omaha, NE 68102

4. Mr. Emil M. Fabian
4939 S. 24th St.
Omaha, NE 68107

5. Mr. Thomas Kenny
400 Continental Bldg.
Omaha, NE 68102

6. Mr. Randall Paragas
9202 W. Dodge,
Suite 302
Omaha, NE 68114

7. Mr. Daniel Ryberg
11823 Arbor
Omaha, NE 68144

8. Mr. Greg Abboud
6550 S. 84th St.
Omaha, NE 68127

9. Mr. Patrick Riskowski
1001 Farman St.,
Suite 300
Omaha, NE 68102

10. Mr. John H. Kellogg, Jr.
11823 Arbor St.
Omaha, NE 68144

11. Mr. Gregory M. Schatz
2433 S. 130th Circle
Omaha, NE 68144

12. Mr. A. Michael Bianchi
318 19th St.
Omaha, NE 68102

13. Mr. Gerald Spence
Spence, Moriarity & Schuster
15 S. Jackson
Jackson, WY 83001

14. Mr. Robert Rose
Rose & Rose
2424 Pioneer Ave.,
Suite 302
Cheyenne, WY 82003

15. Mr. William Dailey
16161 Ventura Blvd.
Encino, CA 91436

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH G. BROCKMAN and CAROLYN KRUGER, Defendants.	8:97CR79 ORDER (Filed Nov. 3, 1997)

Defendant Kenneth Brockman has filed two motions: Motion to Acquire Criminal Justice Act Funds (#45) and Motion for Extension of Time to Pretrial Motions (#46). The motion for extension of time requests a six month extension for Pretrial motions in this case. As good cause for the motion, defendant Brockman sets forth his need to investigate the matters at issue in the indictment. However, as defendant's moving papers establish, this matter has been under investigation by the government for some time, and defendant was aware of the investigation for several years prior to being indicted. The indictment was returned in April of 1997, and the current order allowed defendants to file Pretrial motions through and including October 31, 1997. All of the reasons for the currently requested extension are the reasons that the court granted a generous extension at the beginning of this case. Just cause not having been shown, the requested extension will be denied.

Defendant Brockman's second motion requests the use of CJA funds to conduct discovery in this case,

including the need for an audited accounting statement spanning twelve years and the need for "a large number of expert witnesses to testify at this trial to affirm defendant's professional authority and the appropriateness of defendant's activities." However, none of the facts stated by defendant Brockman in his motion are different from the facts relied upon by defendant Brockman in contesting the government's motion that the Federal Public Defender be required to withdraw at the inception of the case. An evidentiary hearing was held on that motion and, after an order was entered, an appeal was taken. The trial court, having knowledge of the scope of the conspiracy and the wealth of discovery in this case, found that defendant did not meet the provisions of the Criminal Justice Act. Nothing in the moving papers suggests that the decision was in error or should be revisited now. For these reasons, the Motion to Acquire Criminal Justice Act Funds will be denied.

IT IS ORDERED that the Motion for Extension of Time (#46) and the Motion to Acquire Criminal Justice Act Funds (#45) are denied.

Pursuant to NELR 72.3, any appeal of this order shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this order. Failure to timely appeal may constitute a waiver of any such objection. The brief in support of any appeal shall be delivered to Judge Thomas M. Shanahan at the time of filing such appeal. Failure to submit a brief in support of any appeal may be deemed an abandonment of the appeal.

DATED this 3rd day of November, 1997.

BY THE COURT:

/s/ Kathleen A. Jaudzemis
KATHLEEN A. JAUDZEMIS
United States
Magistrate Judge

IN TEE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **KENNETH G. BROCKMAN,** **Defendant.**	**8:97CR79-1** **MOTION TO REQUEST RECONSIDERATION OF MOTION FOR EXTENSION OF TIME TO FILE PRETRIAL MOTIONS AND MOTION TO ACQUIRE CRIMINAL JUSTICE ACT FUNDS TO PREPARE AND PRESENT AND EQUITABLE DEFENSE AND REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT** (Filed Nov. 14, 1997)

Comes now Kenneth G. Brockman, defendant herein, before the United States District Court for the District of Nebraska respectfully submits to the Court the request for an evidentiary hearing and oral argument on the motion for extension of time to file pre-trial motions and the motion to acquire Criminal Justice Act funds to prepare and present an equitable defense. This motion for reconsideration is not for the purpose of retaining counsel due to indigency nor is it a motion to request the court for more generosity of time. The purpose of the motions that were denied was to exercise the defendant's constitutional right to receive equal time and money as given the prosecution so as to prepare and present an equitable defense. In support of this motion for reconsideration of

the two aforementioned motions, the defendant shows to the Court the following:

1. The defendant has not had the opportunity to personally be heard on either motion.
2. The Court has appeared to have developed a disposition towards the defendant based on certain statements made in its rulings.
3. The Court, in its current ruling, seemed to have ignored several new facts presented in each motion.

THE FACTS

The public defender, Mr. Shannon O'Connor, represented the defendant in response to the prosecution's motion to determine the eligibility for appointed counsel. However, the Court did not directly hear from the defendant, nor has the defendant had a hearing on either of his current motions.

The defendant accepted the Court's order regarding the eligibility for appointed counsel and has proceeded pro se, yet the defendant finds the Court has developed certain disposition towards the defendant in its past rulings based on the lack of information heard from the defendant, which, in turn, has effected the Court's decisions in its past rulings. The defendant believes that if the Court had heard directly from the defendant the Court may have better understood the defendant's position and, thus, may have ruled more favorably regarding these two motions.

In her order dated November 3, 1997, the magistrate judge stated that " . . . none of the facts stated by

defendant Brockman in his motion are different from the facts relied upon by defendant Brockman in contesting the government's motion that the Federal Public Defender be required to withdraw at the inception of the case." Thus, the defendant reviewed the government's motion, the defendant's response to the plaintiffs motion the order dated May 19, 1997 by Judge Jaudzemis, and the memorandum and order dated June 12, 1997 by Judge Shanahan. In so doing, the defendant has found the following statements indicative of a predetermined disposition towards the defendant possibly due to lack of information:

1. Judge Jaudzemis stated: "While indigency is not required to qualify for appointed counsel defendant is also not in a position to make him a pauper by exorbitant expenditures to qualify for appointed counsel." Please refer to "Order" dated May 19, 1997, page 3, herein attached as Exhibit 1. This statement suggests that the Court has the disposition that the defendant lacks integrity, that he would contrive his financial situation to gain public assistance. This disposition may be the result that the defendant has been indicted on fraud charges or that the Court has not had an opportunity to get answers to its questions which would have enabled the Court to better understand the defendant's true position.

2. Judge Jaudzemis went on to say that the defendant was "self-serving" in saying that his living expenses paid by 3KM, Inc., do not cover attorney fees for his criminal defense, however, it did cover monthly legal fees of $225 for Mr. Michael Pistillo. Mr.

Pistillo, the defendant's civil attorney, did contact Mr. Sharp on a few brief occasions due to the fact that Mr. O'Connor, the defendant's public defender at that time, was unable or unwilling to do so. However, the major percentage of these monthly payments to Mr. Pistillo was for civil matters, not criminal. A letter from Mr. Pistillo affirming this statement is available if the Court would desire to review it. It is not abnormal for people to include attorney fees in their monthly budget. However, what is abnormal is for anyone to have included in their budget S40,000 and more just to pay the retainer to hire a criminal attorney. Attorneys have told the defendant that his case would likely cost him between S150,000 to $200,000 to properly defend. However, at that time, the magistrate judge was not aware that is was *not* the defendant's decision but 3KM's decision, to disallow corporate funds to pay for the defendant's criminal attorney fees. Please see letter from Mr. Knoblock, president of 3KM to the Federal Public Defender's Office herein attached as Exhibit 2.

3. The magistrate judge recognized the defendant's argument that there was no defense counsel who would take the defendant's case without a substantial retainer and that if the defendant was allowed to make monthly payments of $3,500 to the government to pay for his legal services, that would solve the defendant's argument. However, the judge went on to say that she did not believe it was a sound plan because

the defendant could later discontinue making such payments. She inferred that the defendant would simply decide not to make these payments rather than that he might be financially unable to do so since she also stated that if nonpayment would occur, the Court would have to discharge the services of the public defender. To discharge these services would mean that the Court believes the defendant had the financial means to hire an attorney. The inference is that the defendant would be financially irresponsible. In addition according to the guidelines for financial eligibility established by the Judicial Conference of the United States, "Any doubts as to a person's eligibility should be resolved in his favor." Please refer to the "Order," page 1 hereto attached as Exhibit 1. The Court could have taken the position that if the defendant agreed to the payment plan, he should have been given that opportunity.

4. In Judge Shanahan's memorandum and order, he stated that there was " no evidence (to) show(s) or even indicate(s) that Brockman is not capable of finding additional employment to obtain funds to pay for retained counsel." It may not have been clear in the appeal made by Mr. O'Connor that the defendant is obligated by the joint-venture agreement to develop his concepts to produce marketable products and services. That responsibility demands more than a 40-hour work week. And it is the anticipated profits from this project that he defendant plans to use to repay his lenders, which is the focus of this Indictment.

In addition, the Court in its current ruling failed to consider several facts presented in each motion. In regards to the motion for extension of time to file pretrial motions, the defendant respects the fact that the Court provided several months for each party to file pretrial motions based on "the novelty and complexity of this case," which Judge Jaudzemis stated in her pretrial scheduling order of August 12, 1997. However, Judge Jaudzemis did not address the fact that in addition to the novelty and complexity of this case, the defendant has realistic time-factor disadvantages due to the fact that he has had to proceed pro se. He simply does not have the same advantages as those who have hired counsel. In the motion, the defendant explained these factors: (1) lack of legal training and experience, (2) the need to work full-time to provide a livelihood for his family which limits the time available to devote to his defense, (3) the lack of resources and personnel that attorneys have to prepare for their cases, (4) the lack of objectivity which may interfere with his ability to properly interview potential witnesses necessary to get the facts to prepare his pretrial motions and his defense.

The defendant also pointed out in this motion that the government has had at least six years to prepare its investigations for its pretrial motions while the defense has had only six months and with none of the resources the government has had. Judge Jaudzemis felt that the defendant would have time to prepare his defense before the Indictment. Even though the defendant knew the investigations were ongoing, he believed it was occurring due to the fact that what he was doing was unusual, not that it was illegal. Furthermore, the defendant did not

know the charges until the Indictment nor did he have the discovery documents available to him for review.

In this same motion, the defendant demonstrated his efforts in working on his defense by writing letters and contacting attorneys to seek legal assistance and in reviewing the discovery provided by the government. In his letters to 15 attorneys, he asked for their initial pro bono assistance; however, everyone declined.

In regards to the motion to acquire Criminal Justice Act funds to prepare and present an equitable defense, it was not the defendant's intent to request a court-appointed counsel. Instead, it was a request to be treated fairly in respect to having available to the defendant the same amount of resources as the prosecution has been given to devote to this case so that the defendant has an equal opportunity to defend himself. As a citizen of the United States, the defendant should have the same privileges as the prosecution who is also representing United States citizens. Without an equal amount of time and money to prepare, the defendant is at great disadvantage, which obviously would result in a miscarriage of justice.

In a previous order regarding the motion to determine the defendant's eligibility for appointed counsel, the Court directed its focus on the defendant's income. In this current motion, the issue is not the amount of income the defendant makes but rather the need for the same amount of money, time and personnel that the prosecution has been given to prepare its case *through* trial. As referenced in the defendant's motion, Mr. Dean Ross, an

attorney for the Defender Services Division in Washington, D.C., stated in writing an overview of the implementation and administration of the Criminal Justice Act: "The presiding judicial officer may certify a compensation amount in excess of the applicable case compensation limitation when the case involves extended or complex representation and the excess amount is necessary to provide fair compensation." Please see document, *Defending, a Federal Criminal Case* pp. 19-889 and 19-895, hereto attached as Exhibit 3. The defendant is not expecting anything more, just equal time and money to prepare and present his defense as is given to the prosecution.

ARGUMENT

According to the Court's order issued May 19, 1997, the assigned public defender was ordered to withdraw from representing the defendant. This order was appealed by the defendant through the public defender and was denied by the trial court on June 12, 1997. The defendant accepted the Court's order and has proceeded pro se.

On October 31, 1997, the defendant filed two motions with the Court: (1) Motion for Extension of Time to File Pretrial Motions (2) Motion to Acquire Criminal Justice Act Funds Necessary to Prepare and Present an Equitable Defense. These two motions were denied. However, the defendant requests that these two motions should be reconsidered along with an evidentiary hearing and oral argument since certain facts in each motion were not considered nor were certain facts fully understood by the Court.

In regards to the Motion for an Extension of Time to File Pretrial Motions, the magistrate judge did not consider the time-factor disadvantages of proceeding pro se nor the number of years the prosecution has had to prepare compared to the few months the defendant has had since the indictment. Before the Indictment, the defendant did not know the charges nor did he have the discovery documents available to him for review.

In regards to the second motion, it was not the defendant's purpose to again request court-appointed counsel. Instead, it was the defendant's desire to be treated fairly in respect to having available to the defendant the same amount of resources as the prosecution has been given in regards to this case so that the defendant can have an equal opportunity to defend himself. The Constitution of the United States assures that everyone is considered innocent until proven guilty. Without an equal amount of time and money to prepare, the defendant is at a great disadvantage, which obviously would result in a miscarriage of justice.

In the past, the Court has been directed to focus on the defendant's income rather than the true issue and, that is, to realistically analyze the amount of money, time and personnel that have been involved in the prosecution's preparation of this case through trial. The defendant is not expecting anything more, just equal time and money to prepare and present his defense.

This point, although presented in the motion to acquire Criminal Justice Act funds, was not discussed in the Court's ruling on November 3, 1997.

The Court in its previous rulings, has made a certain disposition towards the defendant. This deposition may be the result of the Court having read or heard information from the prosecution, the fact that the defendant has been indicted on charges of fraud or that the Court has not personally heard from the defendant. However, they all infer that the defendant is not financially responsible and that he is trying to contrive his financial situation just to obtain legal counsel from the government.

The defendant is a citizen of the United States and should have the same privileges as the prosecution who is also representing United States citizens. Thus, the defendant should have access to the same amount of resources (time and money) to prepare and present his defense as the prosecution has and has had in preparing its case.

The Court should not expect the defendant to endure financial hardship in order to fairly defend himself. As the defendant who believes in his innocence, he has already been forced to deal with enough unnecessary stresses due to the indictment, which has effected his reputation, his family's well-being and his business.

If the Court does not wish to grant the defendant's request for Criminal Justice Funds equal to the time, money and personnel that the prosecution will have spent through trial on this case, the defendant requests the Court to explain why the defendant is not allowed this right. Also, it is the defendant's belief that the Court should order a dismissal of the Indictment if the government does not want to equally distribute its resources

between the prosecution and the defendant as they both represent United States citizens.

WHEREFORE, Defendant Kenneth G. Brockman moves this Court to reconsider the two motions for extension of time to file pretrial motions and the motion to request Criminal Justice Act funds to prepare and present an equitable defense. The defendant requests an evidentiary hearing and oral argument on this Motion.

KENNETH G. BROCKMAN,
Defendant

/s/ Kenneth G. Brockman
810 South Fillmore Street
Papillion, NE 68046
(402) 339-8018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing MOTION TO DISMISS FOR VIOLATION OF STATUTE OF LIMITATION AND REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT was duly served upon Jan Sharp, Assistant United States Attorney, at P.O. Box 1228, DTS, Omaha, NE, 68101-1228, and James Regan, 1905 Harney, #710, Omaha, NE, 68102 by regular United States mail, postage prepaid, on the 14th day of November, 1997.

/s/ Kenneth G. Brockman
Defendant

[Exhibit 1 is reproduced at pages 18-22, *supra*]

Exhibit 2

5-29-97

To Whom it May Concern:

This letter is in reference to the joint venture agreement between 3KM and Kenneth G. Brockman, D.C., (KGB), both written and oral. The agreement states that 3KM will provide the capital needed to compensate KGB for his living expenses as well as to develop, market and distribute the products and services contemplated by this agreement.

3KM reimburses KGB's personal expenses as they are presented on a routine basis: there is no set expense fee. If the expenses are less than the previous voucher, the reimbursement is less, etc.

3KM further recognizes that KGB's personal expenses reflect the past use of credit and leases rather than using the money previously loaned to him by private lenders for cash purchases.

It was also reflected in the joint venture contract and agreed orally by KGB and 3KM that no money from this agreement would be used for criminal defense fees, for which there is no provision in the referenced joint venture agreement.

The efforts of the joint venture agreement, which include expense payments to KGB, must concentrate solely on the success of this project. We feel that if money is diverted from the purpose of the joint venture agreement, there would not be sufficient funds necessary to

develop the project. Consequently, the project would suffer and KGB's past private lenders would not be repaid, which is the primary concern of the litigation at hand.

Sincerely,

/s/ Steven R. Knoblock
Steven Knoblock

[Exhibit 3 is omitted in printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-4127NEO

United States of America,	*	
	*	
Plaintiff-Appellee,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
Kenneth G. Brockman,	*	
	*	
Defendant-Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

August 19, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

18 U.S.C. Sec. 3006A. Adequate representation of defendants

* * * *

(b) Appointment of Counsel. – Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and Substitution of Appointments. – A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds

that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

* * * *